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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF OF THE NATIVE AMERICAN RIGHTS FUND, THE HOPI TRIBE, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, THE NEZ PERCE TRIBE, THE SOUTHERN UTE INDIAN TRIBE, THE CHEYENNE RIVER SIOUX TRIBE, THE COLORADO RIVER INDIAN TRIBES, THE NAVAJO NATION, THE BLACKFEET TRIBE, THE NORTHERN CHEYENNE TRIBE, THE PYRAMID LAKE PAIUTE TRIBE, THE ASSINIBOINE AND GROS VENTRE TRIBES OF THE FORT BELKNAP RESERVATION, THE PUEBLO OF LAGUNA, THE PUEBLO OF SANTA ANA, THE JICARILLA APACHE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AMICI CURIAE

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INTERESTS OF AMICI

Each of the *amici* tribes (1) has had its reserved water rights quantified in part, or (2) is currently involved in general stream adjudications, or (3) has concluded negotiations with states, quantifying its reserved water rights, or (4) is involved in or is about to begin water rights negotiations or litigation. The outcome of this case is thus of direct consequence to them. The Native American Rights Fund and the National Congress of American Indians are two major national Indian organizations, supporting Indian rights.

Amici urge this Court to affirm the decision below as to the Wind River Tribes practicably irrigable acreage, and to grant the Tribes' cross-petition recognizing the broader reservation purpose affirmed by the Master below, and the Tribes' reserved right to groundwater. The Court, in so doing will continue the protection of Indian water rights assured in *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963). Written consent of the parties to the filing of this brief has been obtained and lodged with the Clerk.

SUMMARY OF ARGUMENT

1. Indian tribes gave up most of their lands and agreed to settle on reservations—permanent homelands they reserved for themselves. They are entitled to the full economic value of their reservations, which includes unqualified beneficial ownership of all the natural resources of the reservation. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

It was presumed long before *Winters v. United States*, 207 U.S. 564 (1908), that when reservations were created by or for tribes, the water appurtenant to the reservations was reserved. *Winters* confirmed this understanding, enjoining uses by non-Indians that interfered with the Indians' use of their reserved water, even though

the non-Indians put the water to use first and would have had precedence under state law. This Court has similarly protected Indian fishing rights both on and off reservations. *Washington v. Washington Fishing Vessel Assn.*, 443 U.S. 658 (1979); *United States v. Winans*, 198 U.S. 371 (1905).

2. This Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), responded to the need for quantification of tribes' reserved rights, with a maximum use decreed for present and future rights to facilitate planning. Almost all of the issues raised here were also raised and considered in detail in *Arizona*. For instance, in *Arizona* as here, there were turn of the century statutes referring to appropriations for water on reservations under state law. The special master noted that being subject to state water law would have put the Indians in a race with non-Indian water users that the Indians would inevitably lose. He found this contrary to the intent of Congress. This Court agreed.

3. Court decrees and congressionally approved settlements have quantified the reserved rights of numerous tribes under the standards of this Court in *Winters* and *Arizona*. Indian tribes with decrees and settlements have dramatically increased irrigated agriculture on their reservations, helping gain tribal self-sufficiency. This belies arguments that Indians do not need or cannot use water decreed to them. Congress has confirmed that this water development is necessary for Indian economic self-sufficiency.

4. Increased Indian water use has not unfairly impacted on non-Indian users. The "gallon-for-gallon" reduction feared by non-Indians has not occurred. New Indian projects usually require federal funds, years to build, and commonly provide additional water for all parties. As Indian development proceeds gradually, non-Indian junior users generally continue their use of Indian water for years. But a junior user cannot forever preclude use by a holder of a legally senior water right.

5. Continued adherence to the standards of *Winters* and *Arizona* is the only fair course. Litigated cases and congressional settlements have been based on these standards. The standards are not unclear or confusing and foster settlements. This Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), dealt with the narrow purposes of a national forest, not the broad purposes of an Indian reservation, and does not in any way limit *Winters* or *Arizona*. The weighing of equities standard suggested by petitioner is no different from the balancing tests rejected in *Arizona* and more recently unanimously rejected by this Court in *Cappaert v. United States*, 426 U.S. 128 (1976).

ARGUMENT

I. INDIAN RESERVATIONS WERE ESTABLISHED TO PROVIDE PERMANENT HOMELANDS FOR INDIAN TRIBES. THEY NECESSARILY INCLUDE THE WATER ASSOCIATED WITH THE LAND.

A. Tribes are Entitled to the Full Assets of Their Reservations.

The Wind River Tribes tried their water case in state court and proved their right to water for the practicably irrigable land on their Reservation under the standards set by this Court. A state special master, the state district court and the State Supreme Court all affirmed the Tribes' reserved right to water for the practicably irrigable land on their Reservation. The State, having failed to win by the rules, even in its own courts, now asks this Court to change the rules.

This case will thus determine whether the Court will honor the property rights in water established for Indian tribes as part of their reservations, confirmed in *Winters v. United States*, 207 U.S. 564 in 1908 and reconfirmed in *Arizona v. California*, 373 U.S. 546 in 1963. Or whether, when the Indians' property is desired by others, this Court will redefine the rules so that tribes will lose much of the value of their reservations, at a time when significant progress towards economic self-sufficiency is

being realized under the standards long established by this Court.

Reserved rights are property rights. Treaties, statutes and executive orders reserved areas to Indian tribes as permanent homelands. The tribes gave up enormous areas of land, keeping very little. They have paid an enormous price. Indians are morally and legally entitled to the full economic value of the reservations they kept. *See United States v. Winans*, 198 U.S. 371, 380-381 (1905); *Winters*, *supra*, at 576-577; *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

1. *The example of natural resources.*

A reservation includes all natural resources, not just land. A leading case so holding involved the Wind River Reservation, at issue here, and the Shoshone Tribe's ownership of timber and other natural resources. The Court rejected arguments that, when the Shoshone Tribe obtained its Reservation, it merely obtained the right to use and occupy the reserved lands, and not any proprietary interest in the reservation resources:

> The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and *unqualified* possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself.

Shoshone Tribe, *supra*, at 116 (emphasis added). The Indian right in such resources was held to be as valuable as a fee simple ownership. *Id.* at 116-117.

2. *The example of fishing rights.*

Similarly, this Court has protected Indian treaty fishing rights, even off-reservation and where the result was a fish-for-fish diminution in non-Indian fishing. In *Winans*, *supra*, at 381, the Court held that a state law licensing a non-Indian to run a commercial fish wheel could not limit access by Yakima Indians to off-

reservation fishing grounds at which the Tribe had reserved the right to fish "in common with" the people of the territory:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.

In *Winans* the Court also rejected the non-Indian's argument that his method of fishing was more efficient and should therefore supercede Indian fishing:

> It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common.

Id. at 382.

More recently, this Court in *Washington v. Washington Fishing Vessel Assn.*, 443 U.S. 658 (1979), strongly upheld tribal treaty rights despite arguments that non-Indians would lose portions of fish runs that they had long been taking, and would lose investments in boats and gear. Justice Stevens, writing for the Court, affirmed the justice of the Indian position and the long jurisprudence supporting it:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. But our prior decisions provide an even more persuasive reason why this interpretation is not open to question. For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.

Id. at 679. Here, too, prior decisions of this Court virtually decide the principal issues raised by Wyoming and supporting *amici*.

B. In *Winters v. United States*, This Court Confirmed What Had Already Been Understood: That Upon Establishment of An Indian Reservation, Water Was Reserved to Fulfill The Reservation's Purpose.

Prior to the turn of the century, there was no doubt that a tribe or the United States in reserving land also reserved the water appurtenant to the land.[1] After the Reclamation Act of June 17, 1902, 32 Stat. 388—in which the United States agreed to be bound in certain respects by state water law—the states began to question federal control over water on reserved lands. The uncertainty created is illustrated in a 1906 report of the Commissioner of Indian Affairs:

> Prior to . . . [the Reclamation Act of 1902] there seems to be no instance of anyone denying the right and power of the General Government to appropriate sufficient water on an Indian reservation for the needs of the Indians. Recently, however, these have been denied. . . .
>
> But surely . . . Congress . . . could appropriate waters in Indian reservations for the use and benefit of the Indian occupants of those reservations. Whenever the subject has been fairly presented to the Congress it has taken this view, and so far the courts also have sustained the rights of the Indians.

Report of the Commissioner of Indian Affairs, 1906 Annual Report of the Department of the Interior at 83.

The issue did not long remain in doubt. In 1908, this Court affirmed Indian water rights in circumstances that directly impacted competing water users. In an 1888 agreement, the Fort Belknap Indian Reservation was established "as and for a permanent home and abiding place of

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[1] Under the Desert Land Act, 19 Stat. 377 (1877), homesteaders received water under state law, but this Act did not apply to Indian and federal reserved lands.

the [tribes]." *Winters, supra* at 565. The Tribes ceded the territory they did not reserve. Winters and other non-Indians acquired ceded land upstream from the reservation, irrigated the land, and obtained state water rights. At the time of trial, the Indians were also diverting water for irrigation, most of which they began using *after* the appropriative rights of the non-Indians vested under state law.[2]

The United States sued to protect the tribes' rights. The Court rejected arguments by the non-Indian irrigators that the Indians had no reserved right because the ceded lands would be useless if the Indians had reserved the water for their reservation:

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

207 U.S. at 576. These rhetorical questions were answered in the negative; the Court held the Indians did not give up their water. The supposition that the Tribes had given up most of their land and kept their Reservation without the water to develop "agriculture and the arts of civilization" was simply not credible. *Ibid.*

C. This Court in *Winters* and the Lower Federal Courts Responding To *Winters* Protected Indian Water Rights As Needed, Without Attempting To Quantify The Entire Reserved Right.

Winters placed no limit upon the amount of water to which the tribes were entitled in the future. The Indians had reserved the waters which made their Reservation

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[2] See Master's Report *Arizona v. California*, p. 257-258, appended to the Solicitor General's Brief.

"valuable or adequate." A present interference was enjoined. Future interferences could also be enjoined. The decree was thus open-ended.

Similarly, in *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908), the court enjoined an upstream non-Indian user. In discussing the quantity of water reserved for the Indians, the court said:

> What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water . . . may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case.

Id. at 832. The court's decree was specifically "subject to modification, should the conditions on the reservation at any time require such modification." *Id.* at 835.[3]

In *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939), the court limited the Walker River Paiute Tribe's reserved right to an amount of water based on their past irrigation needs, assuming that the tribe's future needs would be satisfied by that amount. But in *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the Court discussed *Walker River*, but followed *Conrad*, holding that:

> [T]he paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow. . .

In sum, prior to this Court's decision in *Arizona*, Indian reserved water rights were consistently vindi-

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[3] Wyoming asserts that there is no suggestion in *Conrad* that the Tribe's water right should increase if its needs should become greater. Wyoming Br., p. 22, n.30. As the quoted language indicates, the State is simply wrong. See also F. COHEN, HANDBOOK OF INDIAN LAW, 318 (1942 ed.).

cated, but were generally left open-ended. And during this period, almost all western water development that took place served non-Indians. As the National Water Commission stated in 1973:

> During most of this 50-year period [following . . . *Winters* . . .], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[4]

II. THE PRACTICABLY IRRIGABLE ACREAGE STANDARD ESTABLISHED IN *ARIZONA v. CALIFORNIA* PROVIDES NEEDED CERTAINTY IN QUANTIFYING TRIBAL RESERVED WATER RIGHTS AND FULFILLS THE PROMISES OF THE INDIAN RESERVED RIGHTS DOCTRINE.

A. *Arizona v. California* Required The Determination Of The Present And Future Water Needs Of The Tribes.

This Court's decision in *Arizona v. California*, 373 U.S. 546 (1963),[5] brought into sharp focus the importance of tribal reserved water rights in the allocation and utilization of the nation's water resources. *Arizona* changed the open-ended uncertainty of prior court decrees of Indian reserved rights, thus allowing both Indians and non-Indians to plan for the future.

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[4] NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES, 474-475 (GPO, 1973).

[5] *Decree entered*, 376 U.S. 340 (1964), *decree amended*, 383 U.S. 268 (1966), *supplemental decree entered*, 439 U.S. 419 (1979), *supplemental opinion*, 460 U.S. 605 (1983) ("*Arizona II*"), *second supplemental decree entered*, 466 U.S. 144 (1984). Unless otherwise stated, references in this brief to *Arizona* or *Arizona v. California* are to the 1963 decision affirming the Master's Report.

In 1952, Arizona filed suit in this Court to determine its share of water from the Colorado River. Without such a determination, Arizona could not obtain federal assistance in building the long-coveted Central Arizona Project. The United States intervened, asserting, among other things, reserved water rights for twenty-six Indian reservations located in the lower Colorado River Basin.[6] That matter was referred to a special master, who held lengthy hearings on the issues presented. *Arizona*, 373 U.S. at 551. For the first time, the resolution of an issue of national significance required the permanent quantification of agricultural and associated rights reserved for future use by Indian tribes.

Arizona's interest was strongly against any Indian reserved rights. Water granted for use on reservation lands in Arizona would come out of that State's share. The importance of the issue, and the variety of reservations—created by statute or executive order as well as by treaty—led to a full and broad consideration of standards for quantification of water reserved for agriculture by Indian tribes. Contrary to California's assertions here (Br., pp. 9-13), these were "lengthy proceedings" in which Indian water rights were vindicated "over strong objection." *Arizona II*, 460 U.S. 605, 609-610 (1983).

B. Almost Every Issue Raised By Wyoming And The *Amici* Supporting Wyoming Was Raised And Answered Squarely in *Arizona*.

Arizona contested every aspect of the tribes' water rights: whether rights were reserved; if so, whether they had been extinguished; and, if not, how they should be measured. The issues are so much the same as those raised by Wyoming here that a ruling for Wyoming is tantamount to reversing *Arizona*.

For example, Wyoming argues (Br., 19-21) that the 1905 Act providing funds to secure water rights under

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[6] Ultimately, it was necessary only to determine the rights of the five reservations on the lower reaches of the mainstream.

Wyoming law showed an intent to substitute state appropriations for reserved rights. Arizona made similar arguments based on a 1904 Act which authorized the Secretary of Interior to divert water for the Reservation "in like manner as though the same were a part of the public domain." (*id.* p. 142), and a 1910 Act appropriating funds to build canals "for the purposes of securing an appropriation of water" (*id.* 144). The Special Master rejected the argument that the Tribes were expected to acquire water under state law, noting:

> It must have been apparent that if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun.

Id. at 261.

Arizona also argued that reserving water is uneconomical because it keeps the water from being put to immediate use (Opening Br. p. 154) ; [7] that the needs for water should be measured by "uses or needs existing either now or at the time the Reservations were established," [8] and that no more than the needs of the number of Indians currently on the reservation should be allowed.[9] *Id.*, at 154-165. The Master rejected *all* these arguments as failing to provide for the future needs of the Indians as intended by Congress or the Executive in establishing the reservations:

> Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other

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[7] Similarly, Wyoming and supporting *amici* complain here that reserved water rights for Indians frustrate optimum allocation of resources (*e.g.*, Salt River Project Br., p. 13-14).

[8] Wyoming and its *amici* urge historic use as the standard here (*e.g.* Wyoming Br., pp. 22-24, Ariz. Br., p. 22), although they concede this Court rejected that standard in *Arizona* (Wyoming Br., p. 24).

[9] Wyoming and supporting *amici* urge the Court similarly to limit Indian reserved rights (*cf.* Ariz. Br., pp. 20-22).

> Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation.

Master's Report at 260-261.

The Master concluded that an award based on current Indian population or needs would require open ended decrees to account for changing circumstances, and this would put all junior water rights in jeopardy and severely hamper financing of irrigation projects. *Id.* at 264. The Master also found (*id.* at 266) that tying water rights to the future development of the reserved lands was actually more in accord with the standards of water management throughout the West and with the status of reserved rights "as property rights":

> [T]he decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow. See *United States v. Powers*, 305 U.S. 527 (1939).

This Court, after extensive briefing on the issues (*see* Arizona's opening brief), specifically rejected equitable apportionment between Indians and non-Indians as inappropriate, *id.* at 597,[10] and affirmed the Master's reasoning and decree:

> [The Master] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. . . . How many Indians there will be and what their future needs will be

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[10] The Court did the same more recently in *Cappaert v. United States*, 426 U.S. 128 (1976), discussed at pp. 28-29 *infra*.

> can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.

373 U.S. 600-601.

C. What *Arizona* Held And What It Did Not Hold.

Arizona provided clear standards for determining the amount of water impliedly reserved for agriculture and related uses in the reservation of lands for Indians whether by treaty, statute or executive order. The decision, as we show in the next sections, has been widely followed by this Court, lower courts and Congress and has been enormously useful.

While *Arizona* gave the standards for quantification as to agricultural and related needs, it did not attempt to quantify what is needed for a tribal homeland where there are major water needs other than for agriculture. Agricultural uses in *Arizona*, as is often the case, dwarfed other uses. But because reservations were set aside as permanent homelands, tribes are clearly entitled to use water for their people to drink, for their cattle to drink, to exploit minerals, to develop industry, to preserve instream flows for fisheries, and for cultural and religious purposes and recreational uses. Non-agricultural uses were so small in *Arizona* compared to large agricultural uses that the United States did not seek special quantification of them. But on some reservations, particularly where there are large populations, minerals or industrial production, but little irrigable land, these uses form a basic part of the reservation. Nothing in *Arizona* should foreclose proof of these needs in such cases.

Arizona did not discuss groundwater. While groundwater uses are not a direct part of the grant of certiorari here, they are so important to some tribes that the Court in ruling here should not inadvertently limit tribal

use of groundwater. At the time most Indian reservations were created, the prevailing law on groundwater was the common law rule that the owner of the surface owns all the percolating waters (ordinary groundwater, not in defined underground streams) under the surface. As stated in the NATIONAL WATER COMMISSION, A SUMMARY—DIGEST OF STATE WATER LAWS (G.P.O. 1973), p. 52:

> Before the science of ground water hydrology was very well understood, it was assumed that percolating water was a part of the land in which it was found, and that the owner of the land owned such water in the same manner that he owned the trees and rocks on the land, or the oil, gas, and other minerals found beneath the surface.

When an Indian tribe reserved land, or had land reserved for it, the understanding of the tribe and of the United States would necessarily have been that the Tribe reserved and remained the *owner* of its groundwater. Thus under *Winters* tribes clearly have a reserved right to groundwater.

In *Cappaert v. United States*, 426 U.S. 128 (1976), by analogy to *Winters*, this Court held that when the United States reserved a national monument to protect a pool of pup-fish, it could enjoin persons with a junior water right from pumping groundwater that would interfere with the reserved right. Tribes, too, obviously have the right to enjoin uses that interfere with their use of groundwater.

Nothing in *Winters* or *Arizona* should limit a tribe's use of groundwater or measure it solely by agricultural needs. A tribe may have little practicably irrigable acreage and yet have considerable uses for its groundwater. The right to use groundwater for municipal and other purposes is literally an issue of life or death, prosperity or poverty, to the desert tribes which often rely substantially on groundwater, and for whom groundwater may be their most valuable material resource. Deep

groundwater particularly may not be practical for irrigation but may be invaluable for municipal or industrial needs. The issue of groundwater ownership and uses should thus either be considered separately here, or reserved for determination later.

III. INDIANS NEED WATER RESERVED UNDER THE *WINTERS* DOCTRINE FOR ECONOMIC SELF-SUFFICIENCY AND USE THE WATER ONCE IT IS QUANTIFIED.

A. Since *Arizona*, Indian Tribes Have Dramatically Increased Irrigated Agriculture On Reservations.

Wyoming and supporting *amici* posit that *Winters* and *Arizona* result in decreeing "too much" water to Indian tribes, water that tribes allegedly cannot use and do not need. (E.g., Wyoming Br., p. 32). The actual experience of tribes with quantified rights since *Arizona*, however, shows that tribes *do* use the water decreed to them, and need that water to make progress toward economic self-sufficiency.

The five tribes in *Arizona* were decreed 905,496 acre feet for 135,636 practically irrigable acres. 376 U.S. at 344-345. In the early 1960s, these tribes were actually irrigating less than 36,000 acres. (Calif. Br., p. 13). By contrast, in the early 1980s, the five tribes used approximately 700,000 acre feet, irrigating about 100,000 acres, *see Arizona II*, 460 U.S. at 653, n.8. This represents an increase of over 60,000 acres under cultivation, an important advancement for the nation's poorest group.

Several other tribes have entered into congressionally-approved arrangements since *Arizona* that have significantly expanded Indian irrigated acreage under cultivation. On the Navajo Reservation, Congress authorized and the Interior Department constructed an irrigation project serving 110,630 Indian owned acres. Navajo Indian Irrigation Project Act, Sec. 2, 76 Stat 96 (1962) as amended. This was part of an agreement in which the

Navajo Tribe relinquished preferential rights to substantial quantities of water from the San Juan River, most of which is now used by the City of Albuquerque. In the past decade, Congress has also enacted six statutes (some still requiring appropriations) establishing the quantified reserved water rights of a number of tribes—all the tribes in Colorado,[11] five Mission bands in Southern California,[12] and three tribes in the Central Valley of Arizona.[13] More congressionally approved settlements are very likely.[14]

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[11] Colorado Ute Indian Water Rights Settlement Act, Pub. L. No. 100-585, 102 Stat. 2973 (1988) (Colorado Ute Act).

[12] San Luis Rey Indian Water Rights Settlement Act, Title I Pub. L. No. 100-675, 102 Stat. 4000 (1988) (San Luis Rey Act).

[13] Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. 100-512, 102 Stat. 2549 (1988) (Salt River Act); Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, 96 Stat. 1261 (1982) (Pagago Act). There was one Ak-Chin Act in 1984, Act of October 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698. This Act was preceded by an earlier, 1978 enactment, the Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409.

[14] *E.g.*, S. 536, 101st Cong., 1st Sess., a bill to settle issues relating to Ute water rights (approving compact between Ute Indian Tribe and State of Utah); March 8, 1989 letter from Senators Inouye and McCain to Senator's Sasser and Domenici, lodged with the Clerk, pp. 2, 10: ("various legislative settlement initiatives . . . are anticipated to be enacted during the 101st Congress . . . [for] Indian claims to land and water similar to those enacted in 100th Congress . . . . All settlements contemplated, as well as those recently enacted, provide substantial benefits to non-Indian water users . . . [and] preclude the necessity for further protracted and costly litigation of competing claims to land and water in western states.") (*five water rights settlements* nearing completion . . . are expected to reach legislative settlement this year.") (emphasis in original)

Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation have negotiated a compact quantifying tribal water rights that does not require congressional ratification because no federal appropriations are necessary and the compact will be incorporated into final court decrees. S.B. 467, Chap. 735, Laws of Montana, 1985.

Each statute settled existing or imminent general stream adjudications.[15] Although the historic facts of each settlement varied, the basic pattern was a common one in the West (see p. 10, *supra*): non-Indians had appropriated existing surface and groundwater resources, thereby denying tribes sufficient waters to irrigate their lands. For example, non-Indian diversions from the San Luis Rey River system in California commencing in the 1890s limited the water available for the Mission Bands, which gave rise to the litigation. See San Luis Rey Act, Secs. 103(a)(2) and 103(a)(3); H.R. Rep. No. 100-780, *supra*, p. 14-15. The same pattern exists along the Salt River in Arizona, where a federal reclamation project appropriated virtually the entire surface flow, including storage sites, in the first decades of this century. See H.R. Rep. No. 100-868, 100th Cong., 2nd Sess. pp. 9-13 (1988). At the Ak-Chin Reservation in central Arizona, since the 1940s "extensive agricultural development by non-Indians surrounding the Reservation . . . through the mining of underground water . . . [had] resulted in a severe decline of water table depths and in a drastic change in the shape and flow patterns of the underground basin." H.R. Rep. No. 98-1026, p. 5 (1984). Nevertheless, the Tribe in 1962 established a "highly profitable Indian-owned [farming] enterprise and . . . achieved near economic self-sufficiency." *Ibid.* As a result of this farming enterprise "[t]he quality of life of the Community and its members . . . . dramatically improved. The various governmental and social services once provided to the members of the Community by the Federal government" were "funded from tribal income with little Federal funding needed." *Ibid.* However, "as a result of this

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[15] H.R. Rep. No. 100-932, 100th Cong., 2d Sess. p. 6 (1988), H.R. Rep. No. 100-780, 100th Cong., 2d Sess., pp. 14-15 (1988); *see generally Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); H.R. Rep. No. 100-868, 100th Cong., 2d Sess. p. 11 (1988); H.R. Rep. No. 97-422, 97th Cong., 2d Sess. p. 12 (1982). Some of these cases are incorrectly characterized in Ariz. Br., p. 12, n.6 as not being general stream adjudications.

off-reservation pumping, . . . the Community . . . had to reduce its irrigation acreage" by over 50 percent in the 1970s. *Id.* at 6.

In these approved settlements, Congress has affirmed the tribes' right to increase their water uses well above historic uses, and in most settlements Congress has provided the means to do so. See Part IV, *infra*. In Colorado, the two tribes will receive over 100,000 additional acre feet.[16] The Mission Bands receive 16,000 acre feet per year, in contrast to historic uses of around 2,000 acre feet annually. H.R. Rep. No. 100-780, *supra*, pp. 30, 48. The Salt River Act establishes that Tribe's reserved rights as 122,400 acre feet to irrigate 27,200 acres, H.R. Rep. No. 100-868, *supra*, pp. 8, 11, 18-19, which is six times its historic use. *Id.* at pp. 9, 13.[17] Congress in these settlements has strongly affirmed tribes' rights to fulfill their reservations' potentials. In all, around 400,000 new acre feet of water will be supplied to these tribes, and Indian irrigated acreage on these reservations should increase by over 70,000 acres.

This increased water is seen by Congress as a necessary condition for economic self-sufficiency of these tribes. For example, in the Salt River Act, Congress found that its goals of promoting Indian self-determination and economic self-sufficiency [18] could be met by:

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[16] H.R. Rep. No. 100-932, *supra*, at 34, 38, 42, 43. These projects serve a total of about 67,000 new acres with irrigation, most of it non-Indian owned. S. Rep. No. 100-555, 100th Cong., 2d Sess., p. 6 (1988).

[17] The Papago Act established reserved rights at 66,000 acre feet annually of surface water and 10,000 acre feet per year of groundwater pumping in contrast to historic irrigation of only 7,000 acres. H.R. Rep. 97-422, *supra*, at 14-15, 21. Ak-Chin's reserved rights are set at not less than 75,000 acre feet to farm 16,000 irrigated acres. H.R. Rep. 98-1026, *supra*, at pp. 6, 17. The historic use at Ak-Chin, after non-Indian groundwater depletions, was less than one-third of that amount. H.R. Rep. No. 95-954, 95th Cong., 2d Sess. p. 13 (1978).

[18] This has been *the* key federal Indian policy in the modern era. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202,

> quantification of rights to water and development of facilities needed to utilize tribal water supplies.

and that such development was

> essential to the development of viable Indian reservation economies, particularly in arid western States[.]

Salt River Act, Sec. 2(a)(3), 102 Stat. 2549. The House Report considered that the settlement would provide the Tribe

> sufficient water and funds to develop a diverse and stable reservation economy, thereby advancing the Federal Indian policy goals of *self-determination and economic self-sufficiency.*

H.R. Rep. No. 100-868, *supra*, at 8 (emphasis added).[19]

Thus, under the standards established in *Arizona*, western Indian tribes have in the past quarter century placed about 200,000 new acres of land under cultivation, providing employment and relieving poverty. Settlements have made rights secure and have provided new water projects serving Indians and non-Indians alike. There are plans for tens of thousands acres more of irrigated

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219 ("[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development'"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.").

[19] Likewise, a primary purpose of the San Luis Rey settlement was to foster "the development of an independent economic base for the Bands." San Luis Rey Act, Sec. 103(b)(4) 102 Stat. 4001. The Colorado Ute Settlement is intended "to enable [the tribes] to develop their water resources and to otherwise make their reservations economically self-sufficient." H.R. Rep. No. 100-932, *supra*, at p. 6.

Indian agriculture under congressional approved settlements. None of this would have occurred without the standards set in *Winters* and *Arizona*. The new land being put into production is necessary for Indian economic self-sufficiency in arid western States, and refutes the claim that "[i]n general, tribes have little desire to develop extensive irrigation projects". (Ariz. Br., p. 10).[20]

B. The Standards Of *Winters* And *Arizona* Are Not Abstract Or Hypothetical, But Result In Judgments That Ensure That Realistic Projects Are Planned And Built.

The increased Indian water use in the quarter century since *Arizona* also answers the complaint that the practicably irrigable acreage standard is hypothetical or abstract. (E.g., New Mex. Br., p. 6). To be sure, the *Arizona* standard necessarily assesses what *can* be done, because it assesses potential for future, not past, irrigation practice. Because the "practicability" component of the standard is an engineering and economic one, the standard is realistic, as the thousands of new Indian acres that have gone into production under it attest.

Moreover, the evidence required to prove practicably irrigable acreage in an Indian water case assures a realistic assessment. Trial preparation typically begins with a hydrographic study of the surface and groundwater of the Reservation and surrounding area by irrigation engineers who will serve as expert witnesses. Then current and historic irrigation is documented, and undeveloped lands that might be practically irrigated in the future are identified. Soil scientists then study the soil to see

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[20] Wyoming (Br., pp. 32-33) and some *amici* postulate that tribes are really interested simply in marketing their water rights, not using them. As shown above, that has not been the experience since *Arizona*. To be sure, the Tribes in this case cross-petitioned from the portion of the decision below that denied them authority to transfer their water rights, but in so doing the Tribes were simply seeking the same right as that held by non-Indian users of state appropriative rights.

which of these lands can sustain long term irrigation. Detailed engineering studies are made laying out reservoirs, canals or pipelines and on-farm systems—usually highly efficient sprinkler or drip systems. The engineers "cost out" these plans. Agricultural economists then determine whether, in absolute terms and in comparison with other projects actually built, the land can be irrigated with a one-to-one benefit cost ratio or better. At each stage, lands not meeting the tests are dropped out.

At trial the master or judge hears the evidence of expert witnesses on both sides and determines how much practicably irrigable acreage has been proved. This Court has held that the preferential forum for adjudicating Indian reserved water rights is state court. *E.g.*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976). There is no reason to expect that state courts will award Indians water rights that have not been tested and proved for practicability, and here the Master, trial court and State Supreme Court all tested the evidence by that standard and ruled on the evidence. Far from promoting "speculative" schemes (compare New Mexico Br., p. 3), the *Arizona* standards have produced concrete Indian irrigation projects on thousands of acres.

Wyoming and supporting *amici* complain that under the practicably irrigable acreage standard, some tribes have *claimed* excessive water, indeed more water than the flow of certain surface streams. (*E.g.*, Ariz. Br., pp. 13-14; New Mex. Br., pp. 2-3, 6-7.) The short answer to that complaint is that those are claims, not judgments. This appeal deals with—and should of course be decided on—the actual judgment based on the actual record. The judgment in this case awards the Tribes far less than the full surface flow of the Big Horn River system, and substantially less than the tribes initially claimed. This is not a judgment awarding more water than there is in a stream; if such a judgment ever occurs—which we submit is very doubtful—it can be reviewed on its own record.

IV. *ARIZONA* AND SUBSEQUENT CASES AND SETTLEMENTS DO NOT UNFAIRLY IMPACT ON NON-INDIAN WATER USERS.

Wyoming and supporting *amici* express concern that enforcement of Indian reserved water rights will, by resulting in a supposed "gallon-for-gallon" reduction of water use by non-Indians, undermine non-Indian economic development and prosperity throughout western states. They argue Indian water rights should therefore be reduced where legally junior non-Indian users have actually put water to use. Compare Wyoming Br. pp. 35-36. This feared "gallon-for-gallon" reduction has not, however, actually occurred where Indian reserved water rights have been quantified and developed following court decrees or congressionally ratified settlements.

As Wyoming and its supporting *amici* concede, the use of water by the five tribes following *Arizona* did not directly impact valid existing uses. (*E.g.*, Ariz. Br., pp. 11-12). The Navajo Irrigation Project and Indian uses protected by congressionally authorized settlements—such as the Ak-Chin, Papago and Salt River Tribes in Central Arizona—receive water developed by new federal storage projects, transfers and exchanges of water.[21] The Colorado Ute settlement was agreed to and supported by the five non-Indian water conservancy districts in the area of the reservations,[22] S. Rep. No. 100-555, *supra*, at 4-5. It also provides for construction of new federal projects which will "leav[e] intact the historical uses already in place on these streams" (*id.* at p. 17) and which provide irrigation water to over 67,000 new acres, most of which are in non-Indian ownership. *Id.* at 6.

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[21] Water to satisfy the Ak-Chin, Papago and the Salt River Tribe quantifications comes in part from the Central Arizona Project, and in part from private non-Indian sales and exchanges of water rights. E.g., H.R. Rep. No. 100-868, *supra*, pp. 12, 15; H.R. Rep. No. 98-1026, *supra*, p. 17; H.R. Rep. No. 97-422, *supra*, pp. 14-15.

[22] State and local officials also commonly support these settlements as a means of augmenting or protecting non-Indian water supplies. E.g., S. Rep. No. 95-460, 95th Cong., 2d Sess., p. 5 (Ak-Chin 1978 Act).

Similarly, to protect existing uses at Salt River, Congress specifically authorized that Tribe to lease 13,300 acre feet of water they are entitled to receive from the Central Arizona Project to certain cities and towns for a period of 98 years. Salt River Act, Sec. 8 (d), 102 Stat. 2555. San Luis Rey water will probably be supplied by water conservation. H.R. Rep. No. 100-780, at p. 11. Non-Indians are not being adversely impacted by increased Indian water use because that use usually occurs by new storage, or as the result of improved water management—conservation, transfers and exchange of water.

Moreover, actual increases in Indian irrigation occur gradually, because very large capital investments—usually by federal appropriations (which non-Indians water users are able to influence)—must be undertaken. In the meantime, until Indian uses develop, the legally junior use by non-Indians can continue.[23] This gradual transition is eminently fair to non-Indians, for the Winters Doctrine quantification is forever, covering future as well as present uses. Accordingly, a prior investment by junior users—even over a period of decades—cannot fairly preclude forever putting the water to use by the legally senior Indians.

V. CONTINUED ADHERENCE TO THE STANDARDS ESTABLISHED IN *WINTERS* AND *ARIZONA* IS THE ONLY FAIR COURSE.

A. Cases Adjudicated Since *Arizona*, Congressionally Approved Settlements And Cases In Litigation Have All Relied On the Standards Established In *Winters* and *Arizona*.

1. *Litigated cases.*

Three federal cases since *Arizona* have finally adjudicated tribal water rights based on the standards in that

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[23] For example, the five tribes along the Colorado River are not yet using their full-entitlement under the decree. *Arizona II*, 460 U.S. at 653-655 (Brennan, J., dissenting); Metropolitan Water District, a prime beneficiary of this gradual transition, admits that this delay has allowed it to continue using a greater amount of water than its legal entitlement over this long period. (California Br., p. 19)

case. *United States v. Anderson*, 736 F.2d 1358, 1362, (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394, 1408-1411 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Four western states—Arizona, Montana, New Mexico and Wyoming—have also adopted the practicably irrigable acreage standard for determining the agricultural water rights of tribes located within those states. In addition to this case, *see United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985); *In Re The General Adjudication of All Rights to the Water in the Gila River System & Source, W-1 through W-4*, (Superior Court of Ariz., Maricopa County, Order filed Sept. 9, 1988); *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600 consolidated (1956) (See New Mex. Br., App. A, Conclusion of Law No. 22.); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985).

2. *Congressional enactments.*

The congressionally approved settlements since 1963 have also applied this Court's standards in quantifying Indian reserved rights. The Ak-Chin settlement was based upon an assessment that the Tribe was entitled to between 70,000 and 100,000 acre feet under the Winters Doctrine based on this Court's standards. H.R. Rep. No. 95-954, *supra*, pp. 12-13. Similarly, the House Committee Report on the San Luis Rey Act states: "the Bands claim a *Winters* right to water for their reservations." (H.R. Rep. No. 100-780, *supra*, p. 13). Hearings on the bill had explained the:

> very comprehensive studies that were done to determine the irrigable acreage and other water requirements on the reservations.
>
> The water requirements were determined by agricultural engineers based on the crops that are grown in the area, as to how much water would be required to develop those irrigatable acres.

Hearings on H.R. 4468 Before the Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs, 99th Cong., 2d Sess., Serial No. 99-78 at 92.

Redefining or overruling the *Winters* and *Arizona* standards would be manifestly unfair to tribes whose rights are still in litigation or before Congress, for it would treat new claims differently from resolved ones and create unwarranted economic disparities among tribes. Moreover, since Congress, in the more than 25 years since *Arizona*, has not seen fit to modify or criticize the standards set by this Court, the Court itself should be most reluctant to disturb the legitimate expectations on which Indian and non-Indian property owners—and Congress itself—have relied. *Square D. Co. v. Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 419-420 (1986); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 410 (1975); *Cappaert*, 426 U.S. at 145.

B. The Determination Of Practicably Irrigable Acreage Has Not Been Rendered Uncertain Or Confusing By Decisions Of This Court After *Arizona*.

Wyoming and supporting *amici* claim there is "understandable confusion . . . in the courts below over the standard which now should be applied" in quantifying water rights on Indian reservations. Wyoming Br., p. 27. The supposed confusion is "[b]ecause of the apparent distinction between the reserved water right quantification standard announced in *Arizona I* and *II* (practicably irrigable acreage) and that more recently announced in *New Mexico* (necessity)". Wyoming Br., p. 27; *see* Chavez County Br., pp. 5-6. Wyoming and *amici* do not support their claim of confusion by reference to any lower court case that failed to apply the practicably irrigable acreage standard to an Indian tribal claim, and there is in fact no confusion in the lower courts. Like the Wyoming Supreme Court in this case, they have applied the standard developed by this Court for the quantification of Indian water rights. So has Congress.

This Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), worked no change in the standard for quantification of Indian reserved water rights. In *New Mexico*, this Court cited both *Winters* and *Arizona* as cases where the United States had reserved water implicitly in order to fulfill the purposes of Indian reservations. 438 U.S. at 698-700 and n. 4. *New Mexico* concerned implied reserved water rights for a national forest, not an Indian reservation. The Court concluded that the intent of Congress in the Organic Administration Act pertaining to national forests "demonstrate(s) that Congress intended national forests to be reserved for only two purposes," to protect forest growth and to conserve water flows so as to supply a greater and more dependable quantity of irrigation water to users downstream. *Id.* at 706-713. The purposes of recreation, aesthetics and cattle grazing were secondary. Indeed, the Court concluded that "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *Id.* at 713.

Because of these principal purposes, —to grow trees and for water to flow out of the forest—the Court held that the amount of water to be retained in the forest was limited to that minimally necessary to fulfill and not entirely defeat the primary purposes of the reservation. Wyoming's extrapolation of that properly parsimonious standard for forests to Indian reservations creates a confusion where none exists, and where no lower court has ever been confused.[24] When they established Indian reservations, Congress and the Executive had far broader purposes—to promote Indian civilization and economic self-sufficiency and to provide a secure homeland for tribes that had surrendered large land areas. And Congress obviously did not create Indian reservations to secure water flows and stable water supplies to down-

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[24] *See, e.g.*, the differences between federal and Indian reserved water rights as discussed by the Montana Supreme Court in *Greely*, 712 P.2d at 766-767.

stream non-Indian irrigators. When the different purposes underlying Indian reservations and forests are compared, any possible confusion disappears.

The reserved water rights of national forests considered in *New Mexico* are different in another respect from Indian reserved water rights. As the Court noted in *New Mexico*, numerous statutes make state law generally applicable in national forests, parks and monuments. 438 U.S. at 702. Indian reservations are not usually subject to state law. As the FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) points out (p. 582, footnote omitted):

> The most important difference between Indian reservations and other federal reservations relates to limitations on state jurisdiction over Indian reservations as contrasted with the states' substantial and, in certain respects, primary jurisdiction over other federally owned lands.

Nor is there any evidence that a supposed "confusion" about application of the reserved rights doctrine has impeded settlement negotiations concerning Indian water rights. The large number of settlements recently concluded totally belies this complaint.[25] In fact, settlement is promoted by a clear doctrine like *Arizona*.

Wyoming and *amici* propose supplanting that clear doctrine with a balancing type test that considers all factors, needs and equities on each particular reservation. (*E.g.* New Mexico Br., pp. 11.) Like this Court in *Arizona*, a unanimous Court in *Cappaert*, 426 U.S. at 138-139 and n. 4, rejected just such an approach as follows:

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate

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[25] While Idaho joins other *amici* in complaining about the confusion in doctrine, it admits it is close to concluding a settlement with the major tribe in Idaho on the Snake River. Ariz. Br., p. 19. In fact, Senators Inouye and McCain list the Shoshone-Bannock settlement with Idaho as one likely to require congressional ratification in this Congress. Letter, n.14 *supra*, p. 10.

an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters v. United States*, *supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.[4]

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[4] Nevada is asking, in effect, that the Court overrule *Arizona v. California*, 373 U.S. 546 (1963), and *United States v. District Court for the County of Eagle*, 401 U.S. 520, (1971), to the extent that they hold that the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Brief for Nevada 15. However, since balancing the equities is not the test, those cases need not be disturbed.

C. It Would Be Manifestly Unfair And Contrary To The Intent Of Congress And The Executive When The Reservations Were Established To Overrule The *Arizona* Standards.

To be sure, the enforcement of Indian rights to use water may transfer the use of some resources from non-Indians to Indians. After all, that is the point of enforcing a right (although as noted in Part IV, a physical solution—more storage or more efficient management—usually occurs). The transfer of resources, to the extent that it occurs, fulfills the promises of the treaties and executive orders creating Indian reservations and adhered to by this Court for over a century. See *Washington v. Washington Fishing Vessel Assn.*, *supra*. "Great Nations, like great men, must keep their word." President Bush, Inaugural Address p. 4 (lodged with the Clerk); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Justice Black, dissenting).

CONCLUSION

By denying tribes their water rights, Wyoming and supporting *amici* would force Indians—the poorest western group—to continue subsidizing water use by non-Indian users who are legally junior to them. One cause of Indian impoverishment has been retarded Indian water development, but that process is being gradually and responsibly reversed as Indian water rights have been quantified, enforced and developed under the standards set by this Court. That process should not be changed because Wyoming lost a case in its own courts. The judgment below should be affirmed as to its ruling on the Tribes' practicably irrigable acreage. The Tribes' cross-petition should be granted recognizing the broader reservation purpose affirmed by the Master below, and affirming the Tribes' reserved right to groundwater.

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